Martin Marietta Corporation, United Brick Division, and Acme Brick Company *and* United Brick and Clay Workers of America, AFL-CIO, Local 566. *Case 17-CA-2122. June 22, 1966*

DECISION AND ORDER

On December 2, 1963, Trial Examiner George A. Downing issued his Decision in the above-entitled proceeding, finding that the Respondent, Acme Brick Company, hereinafter called Acme, had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that the Respondent, Martin Marietta Corporation, hereinafter called Martin, had not engaged in certain other unfair labor practices alleged in the complaint and recommended that the complaint be dismissed as to it. Thereafter, the General Counsel and both Respondents filed exceptions to the Decision with supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning and Zagoria].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, as modified below.

We are adopting the Trial Examiner's conclusion that Acme violated Section 8(a)(5) of the Act. We date this violation from February 1, 1963, at which time Acme, a successor of Martin, assumed possession of the Coffeyville plant.[1]

Acme was obligated under the Act to recognize and deal with the Union as the representative of the employees at Coffeyville and to take no action in derogation of the Union's representative status once it began operating the plant. Clearly, however, it failed to honor this obligation when it rejected the Union's request for recognition and bargaining. It violated its bargaining duty in still another respect. This was on February 1 and thereafter when it staffed the plant—selecting, dismissing, and retaining employees—without consultation with the Union and in disregard of seniority rights of

[1] Cf *Chemrock Corporation,* 151 NLRB 1074; *Maintenance. Incorporated,* 148 NLRB 1299; *Rohlik, Inc.,* 145 NLRB 1236.

the Coffeyville employees.[2] We have noted heretofore that seniority rights are matters which relate to "wages, hours, and other terms and conditions of employment" and therefore fall within the scope of mandatory bargaining imposed by the Act.[3] Seniority rights acquired by employees are not necessarily annulled or obliterated when the contract expires,[4] and the obligation to bargain with respect thereto may continue beyond the contract term. We further believe, in this connection, that seniority rights are not vitiated simply by the advent of another employer.[5] We conclude, in the circumstances in this case, that Acme, like Martin before it, was no more privileged to act unilaterally with respect to seniority rights of Coffeyville employees than it could, for example, unilaterally alter existing wage rates. This unilateral disregard of seniority was in derogation of the Union's representative status. By such action and, of course, by its outright refusal even to recognize the Union, Acme violated Section 8(a)(5) of the Act.

In our opinion, our colleague's conclusion that Martin was obligated to bargain with the Union over the effects of the sale rests upon an unwarranted assumption concerning the extent of Martin's knowledge of Acme's plans and an erroneous conclusion that these "known plans" resulted in an immediate adverse impact on unit employees.

The record indicates that, with respect to Martin's knowledge of Acme's operating intentions at Coffeyville, Martin's belief was at best conjectural. Peirce, at the time general manager of Martin's brick division, stated that while he was negotiating the sale with Acme officials it was "suggested" to him on January 2, 1963, that the plant might not be operated. This assertion, however, appears to be no more than a reasonable assessment by Acme of the plant's economic condition, a fact already well known and contractually considered by Martin and the Union, and, in our view, does not signal the emergence of a bargaining obligation for Martin. Thus, the current contract between Martin and the Union permitted Martin "to determine the extent to which its property shall be operated or shut down [or] to discontinue department in whole or in part . . . ." This provision clearly appears to permit Martin to deal with the economic fact of life that, as noted by Martin, "annual shut downs" of the plant are the rule. Moreover, the record indicates that the

[2] *Bethlehem Steel Company (Shipbuilding Division)*, 136 NLRB 1500, enfd in pertinent part 320 F 2d 615 (C.A. 3).

[3] *Ibid.* Cf. *Shell Oil Company,* 149 NLRB 283.

[4] *Ibid.* Cf. *Orest Panza, et al.* v. *Armco Steel Corporation,* 208 F. Supp. 50, affd 316 F.2d 69 (C A. 3)

[5] As noted by the Trial Examiner, all employees hired by Acme to continue operations at the plant were former Martin employees in the Coffeyville unit. Capps, plant manager under both Martin and Acme, was aware of the seniority system in effect at the plant.

plant's production indeed had been cut to one-half for about 7 months a year earlier, but thereafter was reactivated and operated at capacity. Thus, Acme's mere mentioning to Martin that the former might not operate the plant[6] after purchasing it, does not, in our view, suffice to impose a bargaining obligation on Martin.

Nor does such a suggestion, as our colleague implies, itself create the disadvantages which certain employees suffered because of the change in ownership. More significantly, and in agreement with the Trial Examiner, we believe that in the circumstances of the present sale of a "going concern," it was Acme's failure to discuss with the Union its staffing plans concerning Coffeyville unit employees, including the effect to be given to seniority, which most critically caused an adverse impact to fall upon the affected employees. It may be that where a seller itself imminently plans on or has clear knowledge of the dissolution of the employing entity, an obligation to *timely* discuss matters flowing from such action exists.[7] But we do not find that this is such a case.

Acme interviewed most of the 26 unit employees on January 31, 1963, for future employment at Coffeyville, and in fact hired 15 of them. It also retained key managerial personnel to operate the plant, complete orders previously placed with Martin, took new orders, and purchased additional equipment to make its stock-on-hand more salable. Thus, as the Trial Examiner found, and as our colleague apparently accepts, Acme clearly was a successor employer to Martin at the plant. Accordingly, we cannot agree with our colleague's assertion that by finding Acme in violation of Section 8(a)(5) for not bargaining with the Union concerning seniority rights of unit employees, we are holding thereby "that an employer's employees for bargaining purposes include the whole class of applicants for employment." More precisely, where, as here, only a substitution of employers took place at the time of the sale and, at least for a time the plant operated as a going concern, we conclude that employees at the plant from whom Acme obtained its work force were entitled to be represented by their union in the selection process. As we have noted in a related context "[s]uch individuals possess a substantial interest in the continuation of their existing employee status,"[8] and Acme was not free to ignore their statutory

[6] There is no other indication in the record that Martin had any knowledge of Acme's intentions to phase out the plant. Moreover, in this connection, Kiefer, division plant manager for Acme, stated that the Coffeyville site possessed about 100 years' supply of raw material and that it was at least possible to reactivate the plant although, at the time of the hearing, Acme did not plan to do so.

[7] Cf. *Royal Plating And Polishing Co., Inc.*, 148 NLRB 545, 546. (See also Supplemental Decision, upon remand, 152 NLRB 619.)

[8] *Chemrock Corporation, supra.* In the remaining six plants which formerly constituted Martin's United Brick Division, and which comprise the remainder of the sale assets, Acme has recognized the incumbent unions and has admitted that it is a successor employer at those plants

representative in determining which employes were to retain their jobs.

THE REMEDY

In the particular circumstances of this case, we believe that the remedial policies of the Act will be adequately effectuated by an order which (1) directs Acme, in the event that it decides to resume operations at Coffeyville,[9] to bargain with the Union as the exclusive representative of the employees with respect to terms and conditions of employment at that plant, including the method, terms, and conditions by which employees, including former Coffeyville employees, may obtain employment there, and (2) requires Acme to make whole the Coffeyville employees for such losses as they may have suffered by reason of its unilateral action taken in disregard of their seniority rights. Responsibility for backpay herein shall not extend beyond the date of Acme's shutdown of the Coffeyville plant. Backpay shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, *Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344; and with 6 percent interest thereon as computed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Inasmuch as the posting of a notice as customarily required is not feasible in this case, we shall direct instead that a copy of the notice be mailed to all unit employees who were employed at the Coffeyville plant on January 31, 1963.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Acme Brick Company, Fort Worth, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain collectively with United Brick and Clay Workers of America, AFL–CIO, Local 566, as the exclusive representative of all the employees in the appropriate unit of production and maintenance employees, with respect to rates of pay, wages, hours, and other terms and conditions of employment, including the method, terms, and conditions by which production and maintenance employees may obtain employment, in the event that it resumes operations at its Coffeyville, Kansas, plant.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) In the event that the Respondent resumes operations at its Coffeyville, Kansas, plant, promptly notify United Brick and Clay

[9] The record indicates that the Coffeyville plant is now shut down. We reserve the right to modify our remedial order if made necessary by circumstances not now apparent.

Workers of America, AFL–CIO, Local 566, of such fact, and, upon request, bargain collectively with said Union as the exclusive representative of all employees in the appropriate unit in the manner described above.

(b) Make whole the eligible employees for any losses they may have suffered since February 1, 1963, by virtue of Respondent's unilateral action in disregard of their seniority rights, in the manner set forth in the Decision herein.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail a copy of the attached notice marked "Appendix" [10] to the Union and to each employee employed at the Coffeyville plant on and after January 31, 1963. Copies of said notice, to be furnished by the Regional Director for Region 17, shall, after being signed by an authorized representative of Respondent, be mailed immediately upon receipt thereof.

(e) Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

MEMBER ZAGORIA, concurring in part and dissenting in part:

This case concerns the bargaining obligations of Martin, the seller, and Acme, the buyer, of Martin's Coffeyville, Kansas, brickmaking plant. My colleagues have placed the bargaining obligation on Acme alone. I think, however, that both had an obligation, but that Acme's was not as extensive as my colleagues have found.

Martin is engaged in a variety of business operations, national in scope. The Coffeyville, Kansas, plant, where the Union was the certified representative of the production and maintenance employees, was one of seven plants in its United Brick Division. The latest contract between the Union and Martin was effective until December 30, 1962, and from year to year thereafter, unless changed or terminated upon 60 days' notice.

As early as May 1962, Martin decided to dispose of the United Brick Division. In about November 1962, Martin began negotiations with Acme, a brick manufacturer, for the sale of the United Brick Division plants, but did not publicize its decision to sell or its negotiations with Acme.

[10] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals, Enforcing an Order."

On January 9, 1963, while negotiations with the Union for a new contract were pending, Martin entered into an agreement for the sale of all its United Brick Division plants to Acme. Possession and control of these plants was to be delivered to Acme on February 1, 1963, and Acme agreed to notify Martin by January 25, 1963, "as to which, if any, of Seller's present employees Purchaser intends to employ." Acme, however, regarded the Coffeyville plant as "old" and "obsolete" and economically unfeasible to operate; and, as early as January 2, 1963, Peirce, Martin's United Brick Division manager, knew that Acme so regarded the Coffeyville plant and that Acme might not operate it.

On January 15, 1963, by letter, Martin for the first time notified the Union and the Coffeyville employees of the sale agreement and advised that all United Brick Division employees would be terminated on January 31, 1963. Sometime in January 1963, Acme engaged Kiefer and Capps, operations manager for the United Brick Division and Coffeyville plant manager, respectively, who were Martin's representatives in the then pending bargaining negotiations with the Union to continue in similar managerial positions with Acme, effective February 1, 1963. Acme instructed Capps to formulate plans to phase out the Coffeyville plant.

There were 26 employees in the Coffeyville production and maintenance unit on January 31, 1963; by the end of February 1963, Acme had hired 15 of them, after Capps had interviewed all of them and told them that all production and maintenance employees were being hired on a temporary basis. At no time was the Union consulted in any manner with respect to the separation or hiring of any employee; indeed, Acme rejected the Union's February 6 demands that it continue the Union-Martin contract in effect and bargain about the contract revisions the Union had previously proposed to Martin. Additionally, in the hiring proces, Capps did not refer to the unit seniority list; in fact, several employees were passed over in favor of less senior unit employees. With respect to the other plants involved in the sale, however, it appears that Acme recognized the employees' representatives and continued in effect the contracts negotiated between Martin and such representatives.

In the operation of the Coffeyville plant, Acme filled orders received by Martin prior to February 1, and took new orders to sell its inventory. However, Acme did not manufacture any new brick at the Coffeyville plant, and it purchased additional equipment only to salvage defective bricks and make its stock-in-hand more salable. Between February 1 and September 11, 1963, the date of the hearing, Acme gradually phased out the Coffeyville plant. It was estimated at the hearing that the Coffeyville plant would be completely closed down by the end of September 1963.

I am not concerned, in this case, with the question of Martin's duty, if any, to bargain over the decision to sell. As the record shows, the sale of the Coffeyville plant was not an independent transaction. Instead, it was part of a "package" sale of a number of plants; as to all except the Coffeyville plant, the transfer of ownership apparently had no impact on the bargaining relationship or the employees' conditions of employment; and except for the problems arising from Acme's decision to phase out its operations, there is nothing to show that the factors affecting Martin's decision were any different with respect to Coffeyville than to any of the other plants. In this posture I do not think questions as to the decision to sell Coffeyville can be considered in isolation from questions as to the decision to sell all the plants; and as to that there is no contention that Martin violated the Act.

Different considerations are presented, however, by the problems arising from the fact that Acme did not intend to operate the Coffeyville plant as a going concern, but rather planned to hire only a fraction of Martin's work force at that plant, to sell its existing inventory, and ultimately to liquidate it. As Martin clearly knew of Acme's plans thus to phase out the Coffeyville plant, and as these known plans obviously had an immediate impact on the unit employees, Martin was in my opinion obligated to notify the Union of the impending sale and to bargain with it with respect to the effects of the sale upon the unit employees.

This Martin failed to do. All but signing the contract of sale was accomplished at the time of the third bargaining meeting between Martin and the Union on December 27, 1963, but Martin, even at this stage, failed to inform the Union of the imminence of the sale and continued to use the bargaining process to perpetuate the belief that the employment relationship would continue. Inded, Martin did not notify the Union or the Coffeyville employees of the sale until the contract of sale had become an accomplished fact. By its failure to notify the Union and afford it an opportunity to consult and negotiate prior to the disposition of the plant, Martin may well have contributed to the loss of employment suffered by those employees whose seniority status was disregarded by Acme. Even if bargaining negotiations could not have preserved all unit jobs, with Martin or Acme, the Union might have been successful in persuading Martin to seek an accommodation with Acme which could have safeguarded employee seniority rights built up over the years.[11] I would find, accordingly, that Martin violated Section 8(a) (5) of the Act.

There is in my view no merit to Martin's contentions that a management rights clause in its contract with the Union precludes the existence of any bargaining obligation on Martin's part in this case, and that the Union acquiesced in Martin's action after receipt of the termination letter of January 15. As to the former, the contract clause referred to Martin's right to determine the extent to which its property should be operated or shut down, to discontinue departments in whole or in part, or otherwise to manage its business; hence it has no application to Martin's obligation to bargain as to the effects upon employees of its decision to sell the plant.

As to the latter, the Union's local president on several occasions asked the Coffeyville plant manager about the status of the Union's contract and the prospect of future employment, and each time was told that the manager knew nothing of either matter. Further, the Union's International representative unsuccessfully attempted to reach Martin's Kansas City office on two occasions after learning of the sale. Such efforts, rather than indicating acquiescence in Martin's conduct, reveal a futile attempt to obtain information which should have been discussed before the sale.

Concerning Acme's bargaining obligation, I disagree only with my colleagues' conclusion that Acme had a duty to bargain with respect to former Martin employees whom it never hired, and with the backpay remedy which they grant to such employees.

Under the Act an employer is normally obligated to bargain with respect to *his* employees, and "his employees" are normally those on his payroll. In some circumstances, such as when employees have been refused employment for unlawful reasons,[12] an employer's

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[11] The course of events in this case makes particularly pertinent the Supreme Court's observations in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, and in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203. In *Wiley, the Supreme Court* observed, at page 549, that "Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. *The objectives of national labor policy, reflected in established principles of federal law, require* that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by *some protection to the employees from a sudden change in the employment relationship.*" [Emphasis supplied.] And, in *Fibreboard, supra*, 214, the Supreme Court noted, with respect to subcontracting issues, ". . . that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiations."

[12] See, e g., *Chemrock Corporation*, 151 NLRB 1074 There is no suggestion in this record that any of Martin's former employees were denied employment by Acme for reasons which the Board has up to now considered to be unlawful

employees for bargaining purposes may also include employees who have never been on his payroll. Before today, however, it has never been held that an employer's employees for bargaining purposes include the whole class of applicants for employment. This, however, is in my opinion the necessary meaning of my colleagues' holding that Acme was obligated to respect the seniority rights of former Martin employees whom it never hired, at least until it had bargained with the Union concerning such seniority rights.

I share my colleagues' concern for the protection of employee rights, including seniority rights. Indeed, the recognition by my colleagues of Martin's bargaining obligation would advance that objective. Nonetheless, concern for those rights must be balanced by a proper concern for the employer's rights and the applicable legal principles. Here, Acme's projected operations required less than the full Martin complement, and Martin knew this to be so. None of the employees involved were Acme's employees for bargaining purposes.

My colleagues, in their concern for the Martin employees not hired by Acme, have neglected to give proper consideration to the applicable legal principles and Acme's legitimate interests. As a result they have placed the burden of remedying the injury to these employees on the wrong Respondent.

APPENDIX

Notice to All Employees

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

> We will not refuse to bargain collectively with United Brick and Clay Workers of America, AFL–CIO, Local 566, as the exclusive representative of our employees at our Coffeyville, Kansas, plant, with respect to rates of pay, wages, hours, and other conditions of employment, in the event that we resume operations at the Coffeyville, Kansas, plant.
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> We will, in the event that we resume operations at the Coffeyville, Kansas, plant, promptly notify United Brick and Clay Workers of America, AFL–CIO, Local 566, of such fact, and, upon request, bargain collectively with that Union as the exclusive representative of our employees and embody in a signed agreement any understanding reached.

WE WILL make whole all eligible employees for any losses they may have suffered by reason of our unilateral action in disregard of their seniority rights in the staffing of the Coffeyville plant since February 1, 1963.

ACME BRICK COMPANY,
Employer.

Dated________________ By__________________________________
(Representative) (Title)

Employees may communicate directly with the Board's Regional Office, 601 East 12th Street, Kansas City, Missouri 64106, Telephone FR 4–5282, if they have any question concerning this notice or compliance with its provisions.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This proceeding, brought under Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 163, 73 Stat. 519), was heard before Trial Examiner George A. Downing in Kansas City, Missouri, on September 10 and 11, 1963, pursuant to due notice. The complaint, issued on July 31, 1963, by the General Counsel of the National Labor Relations Board on a charge dated February 26, 1963, alleged in substance that (1) Respondent Martin Marietta Corporation ("Martin") refused to bargain with the Union as the exclusive bargaining representative of its employees in an appropriate unit by announcing to the Union on January 14, 1963, a sale of its United Brick Division (including its Coffeyville plant) to Respondent Acme Brick Company ("Acme"), without prior notice to, or consultation and bargaining with, the Union, and similarly by terminating its employees at the Coffeyville plant on January 31; and (2) Respondent Acme refused to bargain with the Union on and after February 6, 1963, concerning the wages, hours, terms of employment, etc., of the employees at the Coffeyville plant, and that it also preceeded, unilaterally and without notice to the Union, to phase out and close the Coffeyville plant.

Respondents answered separately, denying the unfair labor practices as charged. Martin also averred in part and in substance that the sale of its plant was a transaction outside the scope of the area contemplated by Section 8(a)(5) and 9(a), i.e., "rates of pay, wages, hours of employment, or other conditions of employment"; the sale was made for bona fide economic reasons; prior dealings between it and the Union had established Respondent's privilege unilaterally to shut down, discontinue, or sell the plant without notice to or consultation with the Union; and it in fact provided prompt and adequate notice on January 14 to the Union, which made no request for consultation or bargaining prior to February 1, when full possession and control of the plant was delivered to Acme.

By its answer, Respondent Acme averred in substance that it hired a few temporary employees to phase out the Coffeyville plant, admitted that it did not recognize the Union as the exclusive representative of those employees, and denied that the Union was there exclusive bargaining representative. Acme averred further that it never operated the plant as a *manufacturing* facility, and that it *manufactured* no products after February 1, though work in process was completed.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Respondent Martin, a Maryland corporation, is engaged in the manufacture and development of numerous products at plants in locations situated in several States of the United States. Through its United Brick Division, it operated seven plants engaged in the manufacture and sale of brick and construction materials, including the plant at Coffeyville, Kansas, involved herein.

Respondent Acme, a Texas corporation, is engaged in the manufacture of bricks and other structual clay products, and has plants and offices located in several States of the United States.

Each of said Respondents manufactures and ships goods valued in excess of $50,000 directly to customers located outside the State in which they are manufactured. Each is therefore engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The principal issues herein were those framed by the pleadings, i.e., (1) whether Martin was obligated to give notice and to bargain with the Union concerning the contemplated sale of its United Brick Division to Acme for bona fide business reasons; and (2) whether an obligation to recognize and bargain with the Union devolved upon Acme as a successor corporation.

By argument and by brief, however, the General Counsel injected new issues and additional theories which involved assertion of a joint liability on the part of Respondents and, in support thereof, claims of bad faith, collusion, and conspiracy between Respondents to devastate the bargaining unit.

IV. THE UNFAIR LABOR PRACTICES

A. *The evidence*

The facts in this case are simple and without substantial dispute insofar as material to a determination of the issues herein. I shall, therefore, endeavor to confine my findings to essential facts and to eliminate, so far as possible, the recital of evidentiary details.

Martin is a giant corporation, engaged in a variety of operations, national in scope. It acquired through merger with American-Marietta in 1961 its United Brick Division, which then consisted of some eight brick plants, in Missouri, Oklahoma, and Kansas, including the plant at Coffeyville with which this proceeding is concerned. The Brick Division assets constituted only a small fraction of 1 percent of Martin's total assets. Martin's employees at Coffeyville have been represented since 1952 by the (certified) Union,[1] with whom the last collective-bargaining agreement was executed on March 21, 1962, and which was to expire on December 30, 1962. That contract (and prior ones) contained a management rights clause which provided in material part that nothing in the agreement should be construed to limit the Company's right to determine the extent to which its property should be operated or shut down, to discontinue departments in whole or in part, or otherwise to manage and conduct the business of the Company.

Following notice given by the Union in October, and an exchange of correspondence, negotiation sessions were held on December 17, 18, and 27, at which the Union's contract proposals were discussed between Martin's negotiators, Robert J. Kiefer, operations manager of United Brick Division, and Hubert Capps, Jr., Coffeyville plant manager, and union negotiators, O. Z. Benton, International representative, and Cecil Landrum, president of the local. Though a further meeting was begun on January 10, little headway was made before Kiefer was called away to return at once to Kansas City, where he was informed, for the first time, that the Brick Division was being sold to Acme. No reference had been made at any time during the negotiations to the fact that such a sale was contemplated.

The actual decision to dispose of the division had been made early in May 1962, by Martin's high-level corporate management because of the desire to reduce the extent of Martin's diversification and to put the capital into more productive lines. There followed a search for, and negotiations with, a number of prospective purchasers, also conducted by high-level management, with as much secrecy as was possible under the circumstances. Indeed, the matter was kept a complete secret from Kiefer and Capps, who were managing the Coffeyville plant, until after formal

[1] The Union was certified in March 1952, in an (appropriate) unit composed of all production and maintenance employees at the Coffeyville plant, excluding executives, clerical, office, and supervisory employees.

execution of the sales contract on January 9. That was because it was necessary for Martin to consider the possibility of continuing the operation itself if the deal should fall through and because of apprehensions that if the news should leak, its "efficient well staffed organization" might be decimated by the loss of key personnel who had been attracted to the organization.

The negotiations with Acme, pending for some 2 months, ripened into fruition with the signing of a sales contract on January 9, and with the subsequent delivery of possession and control of the brick plants on February 1. Martin was not privy to Acme's plans or intentions concerning the operation of the seven plants, though there were suggestions by Acme during the negotiations that it might not operate all of them, with specific reference to the Collinsville, Oklahoma, plant and the Coffeyville plant as being old and obsolete and as high cost units which might not be economically digestible.

Returning now to the negotiations with the Union, before Kiefer left the meeting on January 10, Benton suggested that the contract be extended for 30 days, and Kiefer suggested that the extension be, instead, for 60 days and that the Union draw up and submit the extension. Though the extension was drawn, executed by the Union's representatives, delivered to Capps, and by him forwarded to Kansas City around January 11 or 12, it was not executed by the Company, Kiefer testified, because he felt that once the Union knew of the sale to Acme, it would contact him further regarding the situation.[2]

On January 15, Capps handed to Landrum a letter dated January 14, written by Millard Peirce, general manager of United Brick Division, to the Union, informing it that Martin had concluded an agreement under which Acme would acquire all of its brick plants, including Coffeyville, effective February 1, 1963, subject to the approval of the board of directors of both firms. The Union was also informed that Martin was forced to terminate all employees as of the close of business on January 31, 1963, and that though it was not fully aware of Acme's plans for operating the plants, it believed that many of its employees would be hired by Acme. The employees (numbering 26 at the time) were also called together in a group, and Capps read the letter to them.

Martin's operation of the plant ceased on January 31 as announced, and Acme took full possession and control on February 1, though the final closing transaction did not occur until February 13. At no time between January 15 and 31 did the Union make any request of a Martin agent that Martin negotiate about anything.[3]

In the meantime, Kiefer was interviewed by Acme for employment on January 11, and on January 18 Capps was informed that he, too, would be retained. In a meeting at the plant on the latter date, Capps and Kiefer were informed by Acme officials that the Coffeyville operations were to be phased out after January 31, and Capps was instructed to formulate proper plans for doing so and for properly caring for and disposing of all inventory on hand, numbering some 4 million bricks. Actually, it had never been Acme's intention to operate the Coffeyville plant. As early as November, Burnette Henry, its general manager of operations, who had made an evaluation and analysis of all the plants involved in the sale, recommended to Acme's president that the Coffeyville plant not be operated, and that recommendation was accepted by Acme's board of directors.

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[2] Though the General Counsel introduced evidence that on January 10, Kiefer notified the Union that Martin was discontinuing the checkoff of union dues because of the expiration of the contract he makes no contention that such conduct constituted an unfair labor practice, nor does his brief assign it as supporting his claim for an unfair labor practice finding on the basis alleged in the complaint. Cf. *Standard Oil Company of California*, 144 NLRB 520. Of similar standing in the record was other evidence that on January 28, Martin requested from the Union the usual dues checkoff list.

[3] Landrum spoke to Capps only about the contract extension which Capps had forwarded to Kansas City and about whether the employees were going to be employed by Acme. Capps disclaimed knowledge on both points. Although Landrum and Benton testified that it was understood on January 10 that a further negotiation meeting was to be held on January 29, that was disputed by Kiefer and Capps, and the following circumstances tend to corroborate their denials: All four witnesses were agreed that it was understood that a future meeting was to be arranged by a telephone call *on January 14* from Kiefer to Benton or *vice versa*. Both were unsuccessful in their later attempts to reach each other. Furthermore, though Benton was in Coffeyville on January 29, he did not go to the plant office or make any attempt to see any company official. I therefore find that there was no understanding or agreement for any specific meeting date after January 10.

Capps formulated his plans the following week (though not on Martin's time), and though he and Kiefer were, of course, fully aware of the disposition which Acme intended to make of the plant, they at no time gave notice to, or consulted with, the Union concerning the matter, and all of Capps' actions vis-a-vis the employees, hereinafter recited, were similarly taken unilaterally.

On January 31, after quitting time, Capps interviewed the bulk of the 26 employees, informing them that jobs with Acme would be temporary and that qualification was contingent on taking physical examinations. He hired immediately three employees to serve as burners to keep the fires going over the weekend, the only operation which was then conducted. On February 4, he hired 13 more to work in completing the phasing out operations (e.g., drying, heating, burning, drawing, sorting, grading, and shipping). No mining of clay was engaged in and no green brick were produced after January 31.

On February 6, Benton wrote Acme, referring in part to the Union's certification, to its contract with Martin, and specifically to the clause that the contract was to remain in full force and effect until December 30, 1962, "and thereafter, from year to year, unless changed or terminated as provided herein." Stating further that neither party had served notice of a desire to terminate the contract, Benton requested that Acme continue the contract in full force and effect and that it discontinue any unilateral action pertaining to employees' seniority rights and reinstate any employee affected by its action, effective February 1. Benton concluded with a request that Acme bargain with the Union for contract changes as presented by the Union in previous meetings with Martin.

Acme replied on February 14, stating in part that its contract of purchase expressly provided that Acme was not bound by any collective-bargaining agreement of United Brick, and further that after it acquired the Coffeyville plant, it had manufactured no products, though it was "burning off the work in process," and that in order to phase out the plant and ship the products, it had employed on a temporary basis a few employees who had the necessary skills or physical fitness.

In the meantime, Capps terminated two employees on February 8, four more on February 9, and the three burners on February 14. Thereafter, he recalled in April two men for the purpose of expanding the loading crew, and at the time of Capps' transfer to Louisiana on May 6, there were some seven employees, plus the office manager. Before Capps left, however, Acme procured (and later used) new equipment of a special type for the purpose of applying a "slurry" coating to the low grade brick which remained in inventory in order to enhance the apearance of the product and to make it more salable.

Finally, at the time of the hearing in September, there still remained some 2,300,000 bricks on hand and a few motors and other pieces of equipment, all of which Respondent expected to move within the month. Thereupon Acme intends to close the plant. In the meantime, it is employing currently some 4 or 5 employees in dismantling the remaining equipment and doing the last of the shipping.

B. *Concluding findings*

1. Introduction

Before reaching the principal isues as framed by the pleadings (see section III, *supra*), it is necessary to consider additional issues and contentions which the General Counsel injected by argument and by brief and which did not appear to be involved on the face of the pleadings.

Thus there was no complaint allegation that Respondents had jointly committed an unfair labor practice and none that the sale was made collusively, or in a conspiracy, or with intent on either side to evade a bargaining obligation, and the only reference to "good faith" was the conclusionary allegation that Martin had refused "to bargain in good faith" through its *unilateral sale of the plant* without notice to the Union and by the consequent *termination of the employment relation* between it and the employees. Furthermore, in his opening statement the General Counsel represented, with specific reference to the legality of the negotiations as such, that "The only thing we are contending, which is the thrust of our case against Martin [is that] they failed to notify the union of their decision."

Elsewhere, however, in discussing Martin's accountability for *remedy* (assuming the granting of a full remedy against Acme), the General Counsel asserted that Martin should be held jointly liable with Acme for remedying the violations, because the two companies "violated the law concertedly." Renewing those contentions in his brief, the General Counsel now charges for the first time that both

Respondents were guilty of bad faith through "secret negotiations," aimed at "devastation of the unit," and that Martin engaged in a "conspiracy" with Acme to enable the latter to effectuate a unilateral closing of the plant.

Laying aside any question concerning the apparent departure from the theory of the pleadings, I totally reject, as unsupported by the evidence, the General Counsel's claim of conspiracy and collusion and of concerted or joint violations by Respondent. I find to the contrary that the undisputed facts established that Martin's sale to Acme was a bona fide, arms length transaction, made between strangers, for valid business reasons. Such secrecy in negotiations as was resorted to was likewise for sound business reasons [4] and not for the purpose of enabling either seller or buyer to evade an obligation to bargain with the Union.

An additional issue concerning Acme's liability on a basis other than successorship is disposed of in section 2, below, at footnote 5

Turning now to the principal issues, the subject matter presented here, i.e., a bona fide sale of a plant or business for valid economic reasons, is a familiar one in Board proceedings, but one which has normally reached the Board, in unfair labor practice cases on questions involving the buyer's liability as successor to the bargaining obligation of the seller following the sale of a business whose employees are represented by a duly authorized—and certified—collective-bargaining representative. See, for a typical example, *Royal Brand Cutlery Company,* 122 NLRB 901. As the law in such cases is well settled, and as the findings concerning Acme's obligation to bargain will add perspective to the General Counsel's contentions concerning Martin's liability herein, we consider first the question of Acme's refusal to bargain.

2. The issue as to Acme

The facts here plainly made out a case for successorship liability on Acme's part to recognize and bargain with the Union [5] The Union was the certified representative of Martin's employees and was currently engaged at the time of the sale in contract negotiations. Acme hired as its own management representatives, prior to February 1, the two negotiators who had acted for Martin throughout those negotiations and who were thus fully aware of the Union's representative status and of the status of the negotiations.[6] Under the management of those same representatives Acme continued the operation of the plant after February 1 (though in a phasing out process), using the same equipment, and employing only former emloyees of Martin within the bargaining unit. It took over the complete inventory, handled the same products as Martin, completed the processing of "green" or unfinished brick, filled orders which Martin had taken, and took new orders to dispose of the inventory. Because a substantial portion of that inventory consisted of low grade products, difficult to dispose of, Acme purchased new equipment and engaged in a new "slurrying" process to improve the appearance of the product and to make it more salable.

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[4] An employer may desire for many legitimate reasons to keep such negotiations secret from the rest of the business community. See, e g., the comments by Trial Examiner George J. Bott on the adverse effects reasonably to be expected from premature publicity in a sales situation like the present, at page 6 of his Intermediate Report in *United Dairy Company,* Case 6–CA–2551, IR–270–63, issued May 31, 1963.

[5] As I find Acme's obligation to bargain as a successor fully established, it is unnecessary to consider the General Counsel's alternative contention advanced in his brief that an obligation arose independently of the succession because of Acme's subsequent employment of union members Furthermore, it is to be noted that Acme's obligation on the latter score must necessarily be viewed as commencing no earlier than the Union's request of February 6, and that on the record as herein made it cannot be found that a majority of the employees who had been hired and who were employed as of that date were members of the Union.

[6] Though Acme attempted to raise through Kiefer's testimony at the hearing an issue concerning an alleged good-faith doubt of the Union's majority, the defense was not one which Acme had pleaded in its answer, and an objection was sustained, but with leave to proceed by offer of proof. At a later point, Kiefer effectually disproved the alleged defense by his testimony that but for the sale, he would have continued to bargain with the Union on Martin's behalf, and that but for Acme's decision to close the plant, he would have bargained with the Union after the sale

Aside from the foregoing, I find on the basis of proof offered by the General Counsel that on January 31, the Union represented an actual majority of Martin's employees in the unit.

Thus, Acme qualified as a successor employer, with a duty to recognize and bargain with the incumbent union, for "The change of ownership in no way affects the obligation of the employer under the statute" *N.L R.B.* v. *Hoppes Manufacturing Company,* 170 F.2d 962, 964 (C.A. 6). As the same court originally stated the principle, "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." *N.L R.B.* v. *Arthur J. Colten, et al., d/b/a Kiddie Kover Manufacturing Company,* 105 F.2d 179, 183. Or as the Fifth Circuit stated it, "The crucial question . . is whether the employing industry remains essentially the same after the transfer of ownership" *N.L.R B.* v. *Auto Ventshade Inc.,* 276 F.2d 303, 304. The Tenth Circuit similarly held that the question presented was one of continuity: "In deciding this question we necessarily deal in terms of succession of employment, and not succession of employers, i.e., in terms of the continued nature of the employment rather than the source of such employment." *N.L.R.B.* v. *F. G. McFarland et al., d/b/a McFarland & Hullinger,* 306 F.2d 219, 220.

Those decisions represent affirmance of Board law as established in a long line of cases over the years. See for example *Royal Brand Cutlery Company,* 122 NLRB 901; *Auto Ventshade, Inc.,* 123 NLRB 451; *Downtown Bakery Corp.,* 139 NLRB 1352, 1354, *Colony Materials, Inc.,* 130 NLRB 105, *Johnson Ready Mix Co.,* 142 NLRB 437. The latter case also disposes of Acme's contention that it was relieved of any obligation to bargain by the provision in the sales contract that it would not assume any labor contracts of Martin, for the Board there rejected a similar contention, finding that the advent of the purchaser "effected no substantial changes in the operating entity."

Citing *Cruse Motors Inc ,* 105 NLRB 242, 247, for statement of the principle that the controlling fact is whether the employment enterprise substantially continues under the new ownership as before, Acme argues that because it engaged in no further *mining* operations, and because the remaining operations, including slurrying, were only temporary and limited and in the nature of salvaging of assets, a substantial change was effected in the nature of the industry. The facts signally fail to support that contention. Here, as in *Johnson Ready Mix, supra,* Acme, while proceeding to close down the plant, continued to operate the same enterprise with the same employees, under the same supervision, and to perform essentially the same manufacturing operations with the same equipment.

Acme contends further that, assuming its status as a successor employer, any duty to bargain on its part would be limited to the effect of the phasing out operations, and that the Union never made a clear and unequivocal request to bargain on those matters, but only on other matters presupposing the continued existence of the prior contract with Martin.

It is true that the Union's letter presupposed the continued existence of the contract, and it also requested Acme to continue the contract in full force and effect. But the request went further than that. The Union referred to the prior negotiations it had conducted with Martin and requested Acme to meet and bargain with it for contract changes as previously presented to Martin's representatives As those representatives were then acting as Acme's own, and as they were fully aware of the status of the prior negotiations, there was plainly no impediment to immediate resumption of negotiations at the point of suspension. In addition, the Union requested specifically that Acme discontinue its unilateral actions concerning the seniority rights of the employees and that it reinstate any who had been affected by such action since February 1, 1963. Finally, it is noteworthy that Acme's rejection of the request raised no question of the adequacy of the request, but asserted the same contentions upon which it now relies in defense of its refusal to bargain, i.e., it was not bound by United's labor contract because of a provision in its contract of purchase; it was not *manufacturing* any product; and it was employing only a few employees on a temporary basis while phasing out the plant.

I therefore conclude and find that the Union's letter of February 6 was fully adequate as a request to bargain.

I conclude and find that Acme refused to bargain generally with the Union concerning the wages, hours, and other terms and conditions of employment of the employees of the Coffeyville plant and that it was further guilty of a refusal to bargain by proceeding unilaterally, without notice to the Union, with its plan and program to phase out and close that plant. *Town & Country Manufacturing Company, Inc ,* 136 NLRB 1022; *Fibreboard Paper Products Corporation,* 138 NLRB 550, enfd. *sub nom. East Bay Union of Machinists, Local 1304, Steelworkers,* 322 F.2d 411 (C.A.D.C.) "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy . . ." *N.L.R.B.* v. *Benne Katz, d/b/a Williamsburg Steel Products Co.* 369 U.S. 736, 747. See also the Supreme Court's decision in *Order of Railroad Telegraphers* v. *Chicago and Northwestern Railway Co.*, 362 U.S. 330, where it was specifically held that a decision by management to abolish or discontinue any job was a mandatory subject of bargaining.

There remains the matter of fixing the date on which Acme's refusal to bargain occurred. The complaint charged the refusal to bargain generally as commencing on or about February 6, the date of the Union's request, and it charged a refusal, through the unilateral phasing out of the plant, as commencing on or about February 1. The General Counsel argues in his brief that no request was necessary under the facts in this case because the obligation to bargain devolved upon Acme by its purchase of the employing enterprise and because it was under a duty to give notice and consult with the Union concerning its plans to phase out the plant and, in the meantime, to desist from taking unilateral actions vis-a-vis the employees concerning their wages, hours, and other conditions of employment.

That contention is plainly sound. As Acme inherited Martin's obligation to bargain, it was bound to the same extent as Martin to avoid any unilateral action which would invade the statutory area entrusted exclusively to the collective-bargaining representative of the employees. This included giving notice to and bargaining with the Union concerning the contemplated phasing out and closing down of the plant and concerning the unit jobs to be affected thereby. Acme's representatives at Coffeyville knew as early as January 18 that the plant was to be phased out beginning February 1, and they shortly set about making plans to that end. On January 31 they took their first unilateral action to carry out those plans and they have since proceeded unilaterally on all matters of employment, by refusing to bargain with the Union as the representative of the employees. I therefore conclude and find that Acme's refusal to bargain with the Union in the respects above found occurred at all times on and after January 31, 1963.[7]

3. The issue as to Martin

There is yet no Board or court case which holds that an employer is required to bargain with a union about a bona fide sale of his business, nor am I cited to any legislative history indicative of a view that such a matter should fall among the subjects of mandatory bargaining embraced within the statutory language, "rates of pay, wages, hours of employment, or other conditions of employment."

But here, relying upon certain language of the Board in *Town & Country Manufacturing Co., supra,* which involved neither a sale nor a successorship but an employer's decision to *subcontract,* the General Counsel seeks to hold both seller and purchaser accountable for unfair labor practices, i.e., Martin for the failure to bargain with the Union about the sale and Acme for its failure to bargain after the sale. Furthermore, the General Counsel's attempt to extend the *Town & Country* doctrine, itself the subject of diverse court rulings, is made without questioning the solvency of the purchaser or its ability, financially or otherwise, to remedy unfair labor practices which followed the sale, nor is Martin's alleged responsibility grounded on such matters. Neither does the case present an attempt to impose upon a buyer the responsibility for remedying prior unremedied unfair labor practices of a seller. Cf. *N.L.R.B.* v. *Birdsall-Stockdale Motor Company,* 208 F.2d 234, 236–237 (C.A. 10); *N.L.R.B.* v. *Dayton Coal and Iron Corp.*, 208 F.2d 394, 395 (C.A. 6).

In *Town & Country,* the Board reconsidered and reversed its former holding in *Fibreboard Paper Products Corporation,* 130 NLRB 1558, that an employer which unilaterally subcontracts a portion of its operations for economic reasons does not violate Section 8(a)(5) of the Act by failing to notify and negotiate with the representative of its employees with respect to its decision. Concluding that that view "unduly extends the area within which an employer may curtail or eliminate entirely job opportunities for its employees without notice to them or negotiation with their bargaining representatives," the Board held, contrary to *Fibreboard, that* "the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act."

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[7] As that date is close enough in point of time to fall within the complaint allegations of *on or about* February 1 and *on or about* February 6, I do not consider it material that no formal motion was made to amend the complaint.

Though court acceptance of the *Town & Country* doctrine is not yet established,[8] the General Counsel is attempting to extend the principle to cover a bona fide sale of a business, as here presented, on the theory that the *Town & Country* principle will encompass *any* case which might involve *the elimination of unit jobs.*

Though the General Counsel may have stated his theory too broadly, certainly cases (involving sales) may arise or may be hypothetically suggested which would fall within and which would be controlled by the Board's rationale in *Town & Country*.[9] There are cogent reasons, however, why the *Town & Country* doctrine does not control the present case.

We start with a distinction that goes to the heart of the Board's holding, and that is that while either a subcontracting of unit work or a removal or closing of a plan will directly entail an elimination of unit jobs, a sale of a plant as a going concern will not in and of itself have such an effect. To the extent that changes in, and elimination of, unit jobs may follow a bona fide sale, they normally result from independent decisions made by the purchaser, who may decide either to continue the same operations, or to convert to different ones or to different products, or, as here, to close the plant down for valid economic reasons.

The sale as made by Martin did not contemplate or envisage any action by it looking toward the elimination of unit jobs, and Martin took no such action. Despite the General Counsel's argument to the contrary, there is also no evidence of collusive action, none of an intent by Martin to evade its bargaining obligation, and none that Martin was party or privy to Acme's intent or plans. The decision to phase out and to close the Coffeyville plant was made by Acme, independently and alone, and outside the sales negotiations. Thus, it was Acme's decision and Acme's conduct which resulted in the elimination of unit jobs and which constituted, under findings previously made, an unfair labor practice, for which it is being held fully accountable herein as a responsible successor employer.

A final point of some relevance in assessing Martin's sale as an unfair labor practice is the impossibility of framing a realistic remedy. In seeking the restoration of the status quo, the General Counsel specifically demands abrogation of the sales contract, reconveyance to Martin of the plant, and resumption by Martin of possession and operation. The observations made by Trial Examiner Bott of somewhat similar demands in *United Dairy Co., supra,* apply here with greater force. There, in a proceeding to which the buyer was not a party and from which the theory of successorship was removed, Bott refused to order the seller to restore the status quo by going back into business, commenting that such a remedy "is harsh, unrealistic, and perhaps economically impossible."

In the present situation the problem is magnified and, from any realistic point of view, seems insoluble. Furthermore, because of the presence here of a responsible purchaser who is being held fully accountable for remedying all unfair labor practices which resulted from its failure to bargain concerning its phasing out operations, the General Counsel's action in seeking to hold Martin also accountable seems wholly unnecessary.[10]

I therefore conclude and find that the *Town & Country* doctrine is not controlling of the issue as to Martin because the making by it of the sale neither involved nor

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[8] The Court of Appeals for the District of Columbia affirmed the principle in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 322 F.2d 411, and the Eighth Circuit rejected it in *N.L.R.B.* v. *Adams Dairy, Inc.*, 322 F.2d 533. The Fifth Circuit, though enforcing the Board's decision in *Town & Country* itself, 316 F.2d 846, did so on the narrow basis that the employer's "action was motivated by antiunion sentiment and a desire to rid itself of the union," and it did not pass upon the more sweeping duty described in the Board's decision.

A number of other cases are pending at various stages of court testing

[9] Such a case is presently before the Board in *United Dairy Company*, Case 6–CA–2551, on the Intermediate Report of Trial Examiner George J. Bott, IR–270–63, issued May 31, 1963. Though a case similar to it reached the Board in *Weingarten Food Center of Tenn., Inc.*, 140 NLRB 256, the General Counsel there specifically removed the *Town & Country* theory from the case and filed no exceptions to the Trial Examiner's failure to apply it. It is also noteworthy that in neither of those cases was the purchaser joined and that the theory of successorship was not involved or litigated.

[10] Even were it assumed, contrary to my finding herein, that Martin was guilty of a refusal to bargain, it would be only in a technical and theoretical sense, requiring no affirmative action on its part. Cf. *United Dairy Co., supra.* Thus to uphold the General Counsel's views would award him a hollow victory at best.

contemplated the elimination of unit jobs. I conclude and find further that Martin fully met such obligation as it had, under the circumstances of this case, to bargain with the Union concerning its sale to Acme and the termination of the employment relation between itself and the employees. Martin gave prompt and timely notice upon the reaching of a firm agreement, and there intervened a period of more than 2 weeks prior to delivery of the plant during which the Union could have taken up with Martin any matters concerning terms and conditions of employment, including vacation and terminal pay, or any other employee rights which might be affected by the sale of the plant and the termination of the employment relation with Martin. The Union, however, made no contact, asked for no meeting, and presented no demands.[11]

Upon the basis of the foregoing findings of fact and upon the entire record in the case I make the following:

CONCLUSIONS OF LAW

1. The Charging Union is a labor organization within the meaning of Section 2(5) of the Act.
2. All production and maintenance employees at the Coffeyville (Kansas) plant, excluding executives, clerical, office, and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
3. The Union has been since, on or about March 14, 1952, the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the employees in said unit.
4. The Union has been since January 31, 1963, and now is, the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of Respondent Acme's employees in said unit.
5. By refusing to bargain with the Union on and after January 31, 1963, Respondent Acme engaged in unfair labor practices proscribed by Section 8(a)(5) and (1) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
7. Respondent Martin has not engaged in unfair labor practices as alleged in the complaint.

THE REMEDY

Having found that Respondent Acme engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action of the type which is conventionally ordered in such cases, as provided in the Recommended Order below, which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act.

The remedial action which will be ordered here comports with current Board law as established in *Town & Country, supra,* 136 NLRB at 1030, where the Board held that it would be an exercise in futility to remedy this type of violation if the employer's decision (and its unilateral actions in implementation thereof) were permitted to stand. It would be equally futile, the Board held, to direct an employer to bargain with the union over the termination of jobs which the employees no longer held, adding that, "Since the loss of employment stemmed directly from their employer's unlawful action in bypassing their bargaining agent, we believe that a meaningful bargaining order can be fashioned only by directing the employer to restore his employees to the positions which they held prior to this unlawful action." *Id.* at 1031. See also *Fibreboard Paper Products Corp., supra,* 138 NLRB at 554–555; *Northwestern Publishing Co.,* 144 NLRB 1069; but cf. *Carl Renton, et al. d/b/a The Renton News Record, Inc.,* 136 NLRB 1294, 1297.

Effectuation of the policies of the Act requires in the present situation that Respondent Acme restore the status quo ante as it existed on January 31, 1963, by reactivating and resuming the operation of the Coffeyville plant, that it restore the

[11] The conclusions reached herein make it unnecessary to consider other matters advanced by Martin as allegedly establishing its privilege unilaterally to shut down, discontinue, or sell the plant, e.g., the management rights clause in the contract and the history of prior closings of the plant and of prior dealings with the Union. It is also unnecessary to reconsider Respondent's motion to dismiss (denied at the hearing, but renewed in its brief) based on alleged procedural irregularities in the Regional Office prior to the issuance of the complaint.

employees to the positions which they held on that date, or to substantially equivalent positions, and make them whole in usual manner for any loss of pay, and that it bargain with the Union, upon request, in the situation as so recreated. As such action will fully remedy the effect of the unfair labor practices as herein found, it is unnecessary to consider alternative remedies proposed by the General Counsel concerning the offer to the employees of jobs at Acme's other plants.

[Recommended Order omitted from publication.]

Finesilver Manufacturing Company *and* Amalgamated Clothing Workers of America, AFL–CIO. *Case 23–CA–2016. June 22, 1966*

DECISION AND ORDER

On January 24, 1966, Trial Examiner Ramey Donovan issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, the Respondent and the General Counsel filed exceptions to certain portions of the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Jenkins].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modification noted hereinafter.

Although finding that the Respondent had discriminatorily discharged five employees, the Trial Examiner concluded that the discharge of Felipa Palacios was proper because she had failed to obey a direct order of Superintendent Taylor to report to the downstairs office. However, a review of the context in which such alleged "insubordination" occurred establishes to our satisfaction that she too was a victim of a pretext discharge.

Felipa Palacios, an employee since 1953, was a leading organizer and on Thursday, January 21, 1965, she distributed union cards and booklets to employees. On Monday, January 25, she was directed to report to President Mervin Finesilver in the plant's second floor